

LEE ELMER E
82 STATE 26490

03/05/82 115608 PRINTER: LI

UNCLASSIFIED

UNCLASSIFIED

PAGE 01

STATE 026490

ORIGIN L-03

INFO OCT-00 ADS-00 EB-08 EA-12 COME-00 LAB-04 MEE0-01
ANAE-00 JUSE-00 /028 R

DRAFTED BY L/EB - JUDY BELLO

APPROVED BY L/EB - JOHN R. CROOK

L:EVERVILLE

EA/J:JHAYES

EB/OIA:DOLIVE

EB/BP:LGREENW

DOJ/CR:IGORNSTEIN

SF:EKNEEDLER

EEOC:MRUSKIN

EEOC:VBLACKW

DEPARTMENT OF STATE

REVIEWED BY *[Signature]* DATE *9-30-82*

RDS ☐ OF XDS ☐ EXT. DATE ☐

TS AUTH. ☐ REASON ☐

ENDORSE EXISTING ☐

DECLASS ☐ ☐ ☐ ☒

303304 020003Z 167 62

0 012248Z FEB 82

FM SECSTATE WASHDC

TO AMEMBASSY TOKYO IMMEDIATE

UNCLAS STATE 026490

E.O. 12065: N/A

TAGS: JA, EEW, PGOV

SUBJECT: AVIGLIANO V. SUMITOMO LITIGATION IN SUPREME COURT

REFTELS: 79 TOKYO 13800, 79 TOKYO 16091, 79 STATE 227464

1. SUMMARY: LAST FALL THE U.S. SUPREME COURT AGREED TO REVIEW A CASE INVOLVING APPLICATION OF THE U.S.-JAPAN TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION ("FCN") TO PLAINTIFFS' CLAIMS OF EMPLOYMENT DISCRIMINATION BY SUMITOMO SHOJI AMERICA ("SUMITOMO"), A U.S. SUBSIDIARY WHOLLY OWNED BY ITS JAPANESE PARENT. BASED UPON REFTELS, USG HAD TENTATIVELY PLANNED TO STATE IN ITS AMICUS

UNCLASSIFIED

UNCLASSIFIED

PAGE 02

STATE 026490

BRIEF (DUE FEB. 26) THAT GOJ AGREES WITH ITS VIEWS ON ISSUES DESCRIBED BELOW. HOWEVER, MITI AND THE JAPAN EXTERNAL TRADE ORGANIZATION ("JETO") EACH FILED AN AMICUS BRIEF LAST WEEK SUPPORTING SUMITOMO'S POSITION, WHICH IS CONTRARY TO THAT OF USG. DEPARTMENT REQUESTS AS SOON AS POSSIBLE EMBASSY'S RECOMMENDATION CONCERNING ADVISABILITY OF SEEKING CLARIFICATION OF GOJ POSITION ON THE ISSUE OF FCN INTERPRETATION. END SUMMARY.

2. THE FIRST PRINCIPAL ISSUE IN THE CASE IS WHETHER SUMITOMO IS A "COMPANY OF JAPAN" FOR FCN PURPOSES, ENTITLED UNDER ARTICLE VIII(L) "TO ENGAGE (WITHIN THE U.S.1 . . . EXECUTIVE PERSONNEL . . . AND OTHER SPECIALISTS OF THEIR CHOICE." (THE SECOND IS WHETHER THE RIGHT PROVIDED BY ARTICLE VIII(1) IS LIMITED BY TITLE VII OF THE CIVIL RIGHTS OF 1964, AS AMENDED, PROSCRIBING DISCRIMINATION ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN.) BASED UPON THE

UNCLASSIFIED

PAGE 1

UNCLASSIFIED

TERMS, STRUCTURE AND NEGOTIATING HISTORY OF U.S.-JAPAN FCN AND OTHER TREATIES WITH SIMILAR PROVISIONS, DEPARTMENT BELIEVES THAT SUMITOMO IS NOT A "COMPANY OF JAPAN" FOR PURPOSES OF THE FCN, BUT IS INSTEAD AN ENTERPRISE CONTROLLED BY NATIONALS AND COMPANIES OF JAPAN (SEE, E.G., ARTICLE VII(1)). ALTHOUGH SUCH ENTERPRISES RECEIVE EXTENSIVE BENEFITS UNDER THE FCN, THEY ARE NOT A BENEFICIARY OF THE ARTICLE VIII(1) RIGHT TO ENGAGE CERTAIN PERSONNEL "OF THEIR CHOICE."

3. IN TOKYO REFTELS, EMBASSY REPORTED GOJ FOREIGN MINISTRY VIEW THAT "THE MINISTRY CONSIDERS COMPANIES, LIKE SUMITOMO SNOJI AMERICA, INC., INCORPORATED UNDER U.S. LAW TO BE U.S. COMPANIES NOT ENTITLED TO THE PROTECTION OF THE JAPANESE GOVERNMENT." IN DEPARTMENT'S

UNCLASSIFIED

UNCLASSIFIED

PAGE 03

STATE 026490

VIEW, THIS POSITION IS TOO BROAD. JAPANESE AND U.S. SUBSIDIARIES ARE COVERED REPEAT ARE COVERED BY SOME ARTICLES OF THE TREATY, AND RECEIVE SIGNIFICANT BENEFITS, ESPECIALLY UNDER ARTICLE VII(1). HOWEVER, ARTICLE VIII(1) CONFERS RIGHTS ONLY UPON NATIONALS AND COMPANIES OF ONE PARTY WITHIN THE TERRITORY OF THE OTHER PARTY, AND NOT UPON ENTERPRISES CONTROLLED BY SUCH NATIONALS AND COMPANIES.

4. IN VIEW OF MITI AND JETO AMICUS BRIEFS, USG CANNOT MAKE UNCONTRADICTED CLAIM THAT GOJ SUPPORTS THE VIEW THAT ARTICLE VIII(1) DOES NOT APPLY TO SUBSIDIARIES LIKE SUMITOMO. USG HAS SEVERAL OPTIONS IN THIS REGARD. FIRST, WE COULD STRESS THAT MFA, NOT MITI, IS GOJ AGENCY RESPONSIBLE FOR INTERPRETATION OF FCN AND, SO FAR AS WE KNOW, MFA STILL HOLDS VIEW DESCRIBED ABOVE. SECOND, WE COULD SEEK CLARIFICATION OF GOJ VIEW ON THIS ISSUE THROUGH EMBASSY. (FYI, THE DEPARTMENT'S POSITION ITSELF HAS CHANGED IN THIS REGARD. IN 1978 DEPARTMENT TOOK THE POSITION THAT ARTICLE VIII(1) DID APPLY TO SUBSIDIARIES LIKE SUMITOMO. IN 1979 THIS POSITION WAS REVERSED IN LIGHT OF RESEARCH OF FCN NEGOTIATING DOCUMENTS, INTER ALIA.) THIRD, WE COULD NOTE THAT GOJ SEEMS TO HAVE TAKEN CONTRADICTORY POSITIONS IN THIS REGARD, AS EXPRESSED IN TOKYO REFTELS AND RECENT AMICUS BRIEFS. FYI, TOKYO REFTELS HAVE BEEN PUBLICLY RELEASED AND PLAINTIFFS MAY SEEK TO RELY UPON THEM. USG BRIEF MAY ALSO REFER TO AND DISCUSS THEM.

5. DEPARTMENT REQUESTS EMBASSY'S RECOMMENDATIONS ON THIS MATTER ASAP, IN LIGHT OF BRIEFING SCHEDULE. HAIG
UNCLASSIFIED